Filed 1/31/19 Preston v. City of Carlsbad CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PATRICK PRESTON, Plaintiff and Appellant, v. CITY OF CARLSBAD, Defendant and Respondent.	D072950 (Super. Ct. No. 37-2015-00021751-CU-WT-NC)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald F. Frazier, Judge. Affirmed.

The Gilleon Law Firm and James C. Mitchell for Plaintiff and Appellant.

Daley & Heft, Lee H. Roistacher, Mitchell D. Dean and Garrett A. Smee, for Defendant and Respondent.

Plaintiff Patrick Preston appeals from the order, and judgment entered thereon, granting defendant City of Carlsbad (City) a nonsuit on his first cause of action for wrongful termination based on disability and failure to accommodate under the California

Fair Employment and Housing Act (FEHA; Gov. Code,[1] § 12900 et seq.); and his third cause of action for violation of Labor Code section 1050.[2] Affirmed.

FACTUAL OVERVIEW

City hired Preston to work as a patrol officer in April 1990. Preston worked for the Carlsbad Police Department (department) in a variety of capacities until November 1, 2013.[3] He joined the San Diego County (County) Sheriff's Department (sheriff's department) in March 2014.

Under City's retirement system, Preston was able to retire up to 120 days before his 50th birthday. He thus planned to retire/resign[4] from City and join another law enforcement agency. Preston applied to the sheriff's department in late 2012 or early 2013. Preston testified that at or near this same time, he communicated his intention to leave City and join another law enforcement agency to many department supervisors,

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1 All further statutory references are to the Government Code unless noted otherwise.

2 The record shows the court also granted nonsuit on Preston's second and fourth causes of action for failure to prevent disability discrimination (§ 12940 et seq.), and intentional interference with economic advantage, respectively. Because, as we discuss, we conclude Preston's first cause of action fails as a matter of law, we further conclude his second cause of action, derivative of his first, also fails as a matter of law. Preston did not challenge on appeal the nonsuit to his fourth cause of action.

3 Unless noted otherwise, unspecified dates refer to calendar year 2013.

4 The record shows the parties used the words "retire," "retirement," "resign," and "resignation" interchangeably.

including in mid-2013 to then Police Chief Gary Morrison and in early 2013 to then Sergeant Kevin Lehan.

Morrison testified he had a conversation with Preston in early 2013. Preston expressed an interest in taking take the "sergeant's test" offered by the department. However, Preston told Morrison that if he was unsuccessful, he intended on applying for a position with another law enforcement agency.

In early September 2013, Preston received a job offer from the sheriff's department that was conditioned on him passing a psychological and physical examination. Preston sometime in late September or early October underwent his physical examination, which included a hearing test. Preston testified he informed his department sergeants, Gary Spencer and Lehan, that the sheriff's department had conditionally offered him employment as a deputy sheriff, and that his "target" date to leave the department was the "end of October." Lehan denied having any such conversation with Preston.

As a result of the physical examination, County on October 16 sent Preston a letter advising he needed an "otology evaluation," which was scheduled for October 18 with Paul Goodman, M.D. Because the October 16 letter was the first he had heard about needing such an evaluation, and because Preston did not know what an "otology evaluation" meant, he contacted the sheriff's department. It was then Preston learned for the first time that he had failed the hearing portion of the physical examination, thus requiring additional testing. On learning this information, Preston did not "think anything of it," as he then believed his hearing was "fine," a belief he had held "forever."

Preston testified that while employed with the department, he had never experienced any problems with his hearing. Nor had he ever experienced any problems performing his duties as a police officer as a result of any hearing issue. Preston nonetheless consulted with Dr. Goodman on October 18 and took a hearing test that same day.

Preston went to the sheriff's department headquarters on October 25 and met with a variety of sergeants and lieutenants. Preston filled out County paperwork, received his badge and firearm from the firearm's deputy, and had his picture taken for his County-issued identification card. While in the room with the firearm's deputy, Corporal Gaylord Kuamoo of the sheriff's department, who had been Preston's main point of contact during the application process, told Preston, "Hey . . . we are all good to go on your medical. You are getting sworn in for sure next Friday, November 1st." On October 27, Kuamoo sent Preston an e-mail asking for his "bio," which would be used during Preston's swearing in ceremony.

Preston testified he was scheduled to work patrol for the department on Sunday October 27 and on Monday the 28. He called in sick both days. On October 28, Preston sent Lehan the following text message at about 1:36 p.m.: "I retiring on [F]riday. I am also getting sworn in as a deputy on Friday [N]ov 1st. I have 23.5 years at cpd [i.e., the department] can u cut my retire ck and put it my mailbox." At about 1:54 p.m. that same day, Lehan texted back, "Congratulations, good luck and I'll send it through." Preston then did not believe he needed to contact anyone else at the department about his pending

retirement because Lehan was his "day-to-day supervisor" and was "directly in [his] chain of command."

Regarding the October 28 text message, Lehan testified that Preston had been talking about leaving for "years," as Preston had been unhappy working for the department. However, the October 28 text message was the first time Preston had confirmed his actual departure date. As a result of Preston's message, Lehan took Preston off the department's work schedule and began arranging for other officers to cover Preston's remaining shifts through November 1.

Preston's reference in the October 28 text message about a check and his years of service with the department was based on a retirement stipend offered by the Carlsbad Police Officer's Association (association), of which Sergeant Lehan was then president. Lehan testified his response to the October 28 message of "I'll put it through" was in regard to the stipend request by Preston. On receipt of this text message, Lehan initiated the process of obtaining Preston's stipend check from the association.

Lehan testified he was in swat training with other department officers when he received Preston's October 28 text message. Lehan showed the message to his supervisor, Lieutenant Kelly Cain, who told Lehan he would "take care of notifications [up] the chain of command." Lehan considered Preston's October 28 message to be the "big middle finger" at the department because Preston had called in sick two consecutive days and then used a text message to announce his retirement on four days' notice. After being told by Cain that he would make the necessary notifications regarding Preston's

imminent retirement, Lehan was left with the impression that it was "moving and proceeding forward."

The following day, Preston sent an e-mail at about 8:00 a.m. to Cheri Abbott, a City human resources manager, announcing his retirement effective November 1 at "1600" (i.e., 4:00 p.m.). Preston stated in the October 29 e-mail that he would not need Cobra benefits because he would be receiving insurance through his new employer; and that he wanted the balance of his sick leave added to his pension account. Preston in his e-mail asked whether his final check, including his vacation accrual, would be deposited via direct deposit, and whether there was anything else he needed to do before his departure from the department.

Preston testified he made no mention in his e-mail to Abbott about the text message he had sent Lehan a day earlier notifying his chain of command about his departure from the department on November 1. He also admitted when he sent the October 29 e-mail to Abbott, he "fully intended" to leave the department and join the sheriff's department in "a matter of days."

Abbott responded to Preston's October 29 e-mail about three minutes later, which response she also forwarded to Donna Hernandez among others. Hernandez also worked in City's human resources department, was in charge of employee benefits, and would be primarily responsible for processing Preston's paperwork. Abbott advised Preston the department would need a "letter of resignation," which was "typically submitted through [Preston's] chain of command." Abbott testified she wrote this to Preston so that the department could complete a "personnel action form" (PAF), which human resources

required and used to begin "coordinating payroll" among other tasks in preparing for Preston's departure from the department.

Later that day, Hernandez sent an e-mail to the chief's assistant, Suzie Meyer, among others, with a "cc" to Preston. Hernandez in the e-mail asked Meyer to "please process a PAF" (i.e., a personnel action form) indicating Preston's retirement effective November 1. Hernandez testified that before sending this e-mail, she and Preston had spoken over the telephone regarding Preston's benefits.

The following morning, Hernandez spoke to Meyer about the PAF. According to Hernandez, Meyer then was unaware Preston was retiring from the department in two days. Hernandez testified that, if she then had known about the October 28 text message from Preston to Lehan, she would have asked Meyer merely to attach a copy of that message to the PAF, which would have been sufficient to process Preston's paperwork.

According to Abbott, who had nearly 30 years of experience in the human resources field, "any type" of notice — such as a "text, voice-mail . . . [w]hatever the notice might be" — was sufficient for purposes of the PAF. Abbott also testified there was no City rule or regulation requiring a "letter of resignation" before a City employee could resign. Hernandez similarly testified she "regularly" processed City employees' resignations without a letter of resignation, and City accepted "verbal resignations, texts, e-mails, [and] phone calls" to initiate such resignations.

Preston testified he did not complete a letter of resignation and submit it to his chain of command, as directed by Abbott in her October 29 e-mail to him and others.

Because Meyer was unaware Preston had resigned effective November 1, Hernandez called Preston on October 30 and left a voice-mail message, which was transcribed and introduced at trial. In this message, Hernandez informed Preston he needed to contact then Lieutenant Mickey Williams to "formally resign" in order to "separate" from the department. Hernandez testified when she left Preston this message, she was unaware of his October 28 text message to Lehan.

On either October 28 or October 29, Preston received a letter dated October 25 from County human resources stating County's medical examiner had determined Preston had a "temporary limitation" based on the results of his physical examination and "[s]hould be restricted from safety-sensitive tasks which require accurate and rapid understanding of whispered speech and speech heard through doors and windows." The October 25 letter noted that Preston had not passed the "Hearing in Noise Test" (HINT); that Preston could either retake the HINT "prior to or after medical intervention" — what it referred to as "Option One," or retake the HINT using hearing aids — "Option Two"; and that the sheriff's department would separately notify Preston if it was unable to accommodate this temporary limitation.

Frederic Butler, M.D. testified he was the medical examiner who was tasked with determining whether Preston had any physical condition that could adversely affect his ability to work as a deputy sheriff. This examination required a health history and physical exam, including an audiogram which Preston took on October 10.

As part of Preston's employment application, on August 30 he filled out a detailed medical history statement created by the Commission on Peace Officer Standards and

Testing (POST). In the medical history section, Preston answered "no" to the following questions: "Do you have any physical limitations?" "Do you need any reasonable accommodation to assist you in performing required job tasks?" and "Have you sustained any disabling illnesses or medical conditions within the last five years?" Preston admitted that if someone from City or the department had asked him on August 30 whether he needed an accommodation for hearing loss, he would have said, "No, I don't"; and that his hearing did not change between August 30 and October 31.

Based on the results of the October 10 audiogram, Butler on October 15 recommended that Preston take the HINT, undergo an otology consult (i.e., with Dr. Goodman), and be placed on a "medical hold" pending such results.

Dr. Goodman testified he reviewed the results of the HINT and, based on his own examination, prepared an October 21 report for Preston's pre-employment physical. In that report, Dr. Goodman stated that Preston had failed the HINT in a "quiet environment" but passed in the "noise areas." Dr. Goodman testified over objection that he did not evaluate whether Preston's hearing loss constituted a "physical disability," as his role was limited to determining whether Preston "passed or failed that test [i.e., the HINT]." Dr. Goodman nonetheless opined that individuals with "one-sided hearing loss usually accommodate for that by having people speak to their other side or turning their head or in conversation having people direct themselves to the better hearing ear." Dr. Goodman further testified that Preston's right ear hearing was "perfectly normal," and thus, that most people with a diagnosis similar to Preston's themselves accommodate for the hearing loss "quite well." As such, Dr. Goodman opined any such limitations would

likely not interfere with the physical activities persons such as Preston performed on a day-to-day basis.

Dr. Goodman further opined that Preston likely had a loss of hearing in his left ear for a long time; that his hearing loss was not due to "long term exposure to hearing loud noises," but was likely "congenital" or caused by "otosclerosis," which Dr. Goodman described as "a fixation of one of the three little bones or trauma, infection, scarring."

As a result of Dr. Goodman's October 21 report and using the "pre-employment POST standards," Dr. Butler recommended Preston be cleared but "with limits" or "restrictions," as noted and as set forth in County's October 25 letter to Preston. Dr. Butler testified that he did not pass this information on to City, Preston's then current employer; that he did determine whether Preston was authorized by POST standards to be a peace officer; and that he did not know who at County or the sheriff's department made such a determination. Dr. Butler, however, opined that the limitation of "hearing whispered speech and hearing noises through doors and windows," as set forth in the October 25 letter, did not affect a "major life activity."

Preston testified he disregarded County's October 25 letter because Kuamoo had told him a few days earlier County was "good to go" on Preston's "medical" and he "for sure" would be sworn in as a deputy sheriff on November 1. Even after receipt of the October 25 letter, Preston did not believe he had a hearing problem. Thus, at least through October 29, Preston did not tell anyone at the department he had any problems with hearing in his left ear because he believed his hearing was "fine."

All that changed on October 30, two days before his proposed departure from the department. That morning, Kuamoo left Preston a vague voice-mail about some paperwork. Preston returned the call and spoke with Kuamoo, who informed Preston he had been placed on a "medical hold" because of left ear hearing loss. Kuamoo instructed Preston to contact County human resources, who advised Preston to make an appointment with his own health care provider. Preston made an appointment for later that afternoon.

Preston testified that he "could do all of the duties" expected of a police officer on October 29; that on this date, he did not need "any accommodation to help him do his job based on any physical disability"; and that he in fact "excel[ed]" as a police officer at this point in his law-enforcement career.

Preston also testified that, when he awakened on October 30, he was the same physically as the night before and believed on that day he could do "every aspect" of his job as a police officer; and thus, that he did not need any accommodation due to hearing loss until he spoke to Kuamoo that morning and was advised of the "glitch" in his being hired as a deputy sheriff. Even after learning he was on a medical hold with County, Preston did not ask anybody at the City — including on October 30 or 31 — "for any type of accommodation to help [him] do [his] job as a police officer due to hearing loss." Preston admitted that what he then wanted "was to keep being paid by the City . . . so [he] could get [his] ear fixed, so [he] could get [his] new job with the County"; and that he was "shocked" when he received the news about the medical hold from Kuamoo on October 30.

Preston testified after receiving the news from Kuamoo, he promptly notified Lehan both by phone and text message that County had placed him on a "medical hold"; that he therefore would not be retiring on November 1; that he intended to be at work on Sunday, November 3; and that he was "putting in an I.O.D." (i.e., injured on duty) request with City for what he deemed to be job-related hearing loss in his left ear. The text message, which Preston sent at 11:39 a.m. on October 30, and which was transcribed and included in the record, said nothing about an IOD or hearing loss, but instead provided: "[W]as just advised that I am on a medical hold from [t]he county. [T]herefore I will not be sworn in on Friday. I will be at work on [S]unday." Lehan responded at 11:54 a.m. as follows: "You need to call either [Captains Paul] Mendes or [Neil] Gallucci. [¶] I don't have a problem with it but I had to hire OT [i.e., overtime] and notify Cain why. So everyone is assuming you're gone???"

After contacting Lehan, Preston at 11:40 a.m. on October 30 spoke with Williams by phone. Preston testified Williams said, "No problem," "call H.R., undo whatever you did," and "go back to work on Sunday," in response to Preston's statement he was not retiring from the department effective November 1. Preston testified he also called Hernandez, informing her of the medical hold and his decision to unretire. According to Preston, Hernandez told him the point was "moot" because she had been unable to "process the paperwork anyways."

Williams testified it was sometime after Preston's October 29 e-mail to Abbott that he personally became aware of the exact date of Preston's retirement from the department; that during their October 30 telephone call, he never told Preston it was

"okay" to "undo whatever [he] did at H.R. and go back to work," or otherwise accepted Preston's request to unretire, as only Chief Morrison had such authority; that Preston then did not say why he had been put on a medical hold by County; and that Preston never said during their conversation he "needed a medical intervention on his left ear," or that he intended to submit an IOD as a result of a workplace injury.

Williams also testified that Preston seemed "guarded" and less than forthcoming during their October 30 phone call, despite the fact they had known each other for about 15 years and had spoken "at length about many personal things, about [their] families, about all kinds of stuff." Williams testified he told Preston he would "pass [the information about unretiring] along," or words to that effect.

Shortly after his October 30 phone conversation with Preston, Williams sent an e-mail to myriad individuals including to Morrison, Gallucci, Cain, and Hernandez, informing them that Preston was on a medical hold with County, and that he was intending on working his scheduled shift the following Sunday. Williams circulated this e-mail because in his view, Preston had "circumvented" professional standards in the manner in which he had announced his retirement from the department. Sometime after sending this e-mail, Williams learned that Preston had come to the station and filled out some "documents" regarding an "injury." Williams could not recall the date he actually saw the IOD paperwork submitted by Preston, but knew it was sometime before November 6.

After sending the October 30 e-mail, Williams spoke with Hernandez. She informed Williams that when a person resigns from the department, he or she does not

"automatically have the authority to retract that resignation, and that was an issue that needed to be decided, and that decision [would] rest[] with the chief of police." Williams next spoke with Morrison about Preston's situation, likely on October 31. During their discussion, the issue of Preston having hearing loss never came up. Morrison advised Williams of his decision not to allow Preston to unretire. Morrison testified he did not learn the nature of Preston's medical hold with County until about a week or two after Preston had left the employ of the department.

Preston testified he next reached out to Cain, informing him of the same thing he had told Williams. Preston went to his medical appointment at 2:00 p.m. on October 30 and, as a result, made an appointment to meet with surgeon Todd Broberg, M.D. on November 1. At about 7:00 p.m. on October 30, Cain returned Preston's phone call and advised Preston he was going to have to speak with Gallucci about unretiring.

In the evening of October 31, Preston received an e-mail from Williams summarizing the events leading up to Preston's departure from the department. The e-mail noted Preston had advised officers Lehan and Spencer he was "resigning" from the department and had sent an e-mail on October 29 to Abbott also stating he was retiring effective November 1 at "1600." As such, Williams stated Preston's resignation was "acknowledged and irrevocable," and advised Preston to contact him to "facilitate the recovery of all assigned equipment."

Williams testified when he sent Preston the October 31 e-mail, he did not know Preston allegedly had a "hearing disability that would have affected his ability to do his job as a police officer." During the times they worked together, including in 2012 when

they worked in the same unit, Williams never suspected that Preston had a hearing problem. Nor did Preston ever tell Williams he was having an issue with his hearing.

The following day, November 1, Preston called Gallucci at 7:00 a.m. to discuss his situation and asked to speak to Chief Morrison. According to Preston, Gallucci informed him the chief did not want to speak or meet with Preston, and directed Preston to contact City human resources. That same morning, Preston went to his prearranged doctor's appointment. After his consult with Dr. Broberg, Preston testified he "knew [he] had a hearing issue."

Preston next went to City human resources, where he submitted the IOD form. On the form dated October 30,[5] Preston described the nature of his injury as "LT ear hearing loss from continuous tra[u]ma." He stated the date of injury was between April 1990 — when he was hired — to the "present," and his injury was due to "patrol duties" and "training." Preston testified he obtained legal advice regarding what to say in the IOD form he submitted on November 1. Preston did not feel "obligated" to include County's October 25 letter notifying him of the limitations imposed by County and the reason for such limitations.

Abbott testified that before Preston submitted the IOD form, he had never complained of any disability limiting his ability to work as a police officer, including as a result of any hearing loss; that she was personally unaware of him having any hearing issues; and that he never sought a change in his job responsibilities or work schedule, or

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[5] Preston testified he actually filled out the form in his own handwriting while at home on October 31.

requested any additional "equipment or devices" to help with any hearing issues. Abbott further testified that her duties at City included accommodating people with disabilities.

Preston testified he told Abbott during their November 1 meeting that he needed surgery on his left ear because one of his bones was "almost protruding — [was] laying on [his] ear drum and almost protruding through [his] ear drum," and thus, City could not let him go because he had filed an IOD form. Preston thus wanted the department to "accommodate" him by allowing him to keep his job. Preston also testified that during this supposed meeting with Abbott on November 1, he "believed [he] could perform all of the duties of being a police officer with no accommodation"; and that once back at work with the department, he did not believe it was necessary to restrict him "from safety sensitive tasks which require[d] accurate and rapid understanding of whispered speech" or "speech heard through doors."

Preston could not recall whether he told Abbott during this conversation that County had determined he did not meet the POST standards to be a peace officer in California because of his hearing issue, stating he "could have," but was "[n]ot exactly sure." Preston admitted he did not provide this information to Hernandez or Williams. He also did not tell anyone in City human resources he had failed the HINT. According to Preston, Abbott said this was a department issue, and suggested he speak with then City Manager Kevin Crawford. Abbott, however, denied being involved in any such meeting or conversation with Preston on that day.

Hernandez testified City was able to process an IOD claim after an employee had separated from City. Hernandez further testified that during her various interactions with

Preston, whether by e-mail, phone or otherwise, he never once stated he had hearing loss, or a physical disability related to hearing loss, or requested an accommodation based on any such alleged disability.

After leaving human resources, Preston next went to the department and spoke with Cain, who informed Preston he had been "locked out" of the department's computer system. Cain nonetheless allowed Preston to use his computer to write an e-mail to Crawford, which he "cc'ed" to various other individuals of the department and City, asking that his "resignation" be "rescind[ed]" in light of County's medical hold. Although Preston summarized the events leading up to the October 31 e-mail from Williams informing Preston his resignation was "irrevocable," Preston in his November 1 e-mail did not mention the reason County had placed him on a medical hold or request an accommodation from City once he returned to duty.

At about 4:45 p.m. that evening, department Chief Morrison left Preston a voice-mail message stating in part as follows: "The matter of your resignation has been reviewed by the city manager. He concurs with HR's opinion that we are not going to accept any recission [*sic*] of that resignation. So therefore, you are officially no longer an employee of the City of Carlsbad. You will be getting a certified letter saying such on Monday from the city manager."

A little before 7:00 p.m. on November 1, Preston text messaged Lehan stating: "cpd [i.e., Carlsbad Police Department] let me go knowing I have to have ear surgery. [A]fter surgery I have to take another hearing test. SDSO [i.e., sheriff's department] feels real bad about the pickel [*sic*] they put me in. [B]ut [I] don't fault them[.]" About two

minutes later, Lehan wrote: "Was it IOD and did u ever file a claim? [¶] If you want the number for a workers comp attorney let me know."

Lehan testified that this was the first time he had heard that Preston had a problem with his hearing; that he asked Preston whether he had filed an IOD because Lehan was then president of the association; that before Preston's November 1 text message, he never knew or suspected Preston was experiencing hearing problems; and that between October 28 and November 1, Preston never asked him for any accommodation due to hearing loss.

Preston testified he underwent surgery on his left ear on December 10. In early February 2014, Preston retook and passed the HINT, and was cleared by Dr. Butler. As a result, the County removed its medical hold and Preston became a deputy sheriff on March 7, 2014.

Preston testified at trial that, when he was deposed in mid-2016, he was then working as a deputy sheriff; that his hearing in mid-2016 was "just like it was around the end of October of 2013," as post-surgery he had experienced some additional problems with his left ear; and that in mid-2016, he did not ask County to accommodate him as a result of any hearing loss, nor did he then believe any such accommodation was necessary. In Preston's view, "there was nothing . . . [he] couldn't do as a deputy" sheriff, even though his hearing was the same as when he left the department on November 1.

PROCEDURAL OVERVIEW

A. *Operative Complaint*

As relevant to this appeal, Preston's operative complaint alleged that in October 2013 he learned he had been hired by County as a deputy sheriff; that he underwent his preemployment physical for the sheriff's department on October 18; that he submitted his retirement notice to City effective at 4:00 p.m., November 1; that on October 30, he "learned he had a partial loss of hearing in his left ear caused by noise trauma since 1990 from extensive exposure to small arms fire and continuous on-the-job traffic noise"; that the hearing loss was "potentially correctable with surgery, but without surgery, the hearing loss meant [he] could not serve as a police officer in California"; and that on October 30, he "informed his immediate supervisor of the results of his physical examination, the job-related hearing loss, and that he was rescinding his retirement notice based on the injury."

It further alleged that Preston filed his IOD claim with City on October 30, based on what he believed was "job-related" hearing loss. However, the following day, October 31, Preston was informed by City and the department that "he had resigned, the rescission of the retirement notice was not accepted and he was no longer a City employee or a police officer with the [department] effective November 1, 2013." Preston underwent surgery on December 12 to correct his hearing loss, and, after a full recovery, joined the sheriff's department in March 2014.

In his first cause of action for wrongful termination — physical disability discrimination (§ 12940, subds. (a), (m), & (n)), Preston alleged that City "knew [he] had

a physical disability" as statutorily defined; that City failed to provide him any accommodation, such as "placing [him] on limited duty or off work with pay pending his corrective surgery for the partial hearing loss"; and that City failed to engage in an interactive process with him to determine such accommodation, but instead terminated his employment on November 1, after it refused to "accept [his] rescission of his retirement notice."

In connection with his third cause of action for violation of Labor Code section 1050, Preston alleged that sometime after July 29, 2014, and between this date and September 15, 2014, Chief Morrison "wrote the Sheriff's Department accusing Preston of . . . conduct unbecoming [of] a sworn law enforcement officer for conduct in May and June 2014, after he was no longer employed with City."[6] This complaint led to an internal affairs investigation by the sheriff's department against Preston, case no. 2014–194.1. Preston was exonerated of all charges of misconduct in late January 2015.

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6 In this letter, Chief Morrison noted that in May 2014, Preston made an unsolicited call to department detectives in the crimes of violence unit regarding the 2007 homicide of Jodine Serrin, which Preston had extensively investigated while working in that unit. Preston testified while working in his yard in May 2014, a "thought popped into [his] head," "kind of like Jodine was talking to [him]," about the murder. Chief Morrison further noted that Preston believed a former department police officer, who had been terminated and prosecuted for stealing narcotics from the property room, was a potential suspect in that homicide; and that Preston suggested department detectives compare the discharged officer's DNA to the DNA believed to have come from the suspect. The letter went on to note that department detectives investigated this information and found the discharged officer was not a suspect. Because the homicide was unsolved (which was still true in 2017 at the time of trial), Chief Morrison wanted Preston to prepare a written report for the file summarizing these events, which up to then, Preston had not done.

Preston alleged the complaint by Morrison to the sheriff's department constituted a representation that he was not competent to act as a law enforcement officer and was "unfit to perform his job duties" as a deputy sheriff. Preston alleged this representation was false; that City knew it was false when Morrison, on behalf of City, made this representation; and that it resulted in "adverse employment action" against him, including subjecting him to the internal affairs investigation. Preston requested treble damages under Labor Code section 1054 as a result of City's alleged wrongful conduct.

B. *Court's Ruling on Nonsuit Motions*

At the conclusion of Preston's opening statement, City moved for nonsuit on Preston's third cause of action for violation of Labor Code section 1050. City argued that, because Preston already was employed by County as a deputy sheriff when Morrison on or about July 16, 2014, wrote the sheriff's department regarding Preston, as a matter of law Labor Code section 1050 did not apply because by its language, it only precluded a former employer such as City from interfering or attempting to interfere with Preston's *attempt* to obtain employment with County. The court agreed and granted the motion.

At the close of Preston's evidence, as relevant here City moved for nonsuit on Preston's first cause of action. The trial court granted City's motion, ruling Preston was not entitled to rescind his resignation based on *Armistead v. State Personnel Bd.* (1978) 22 Cal.3d 198:

"For any reviewing court, this court has struggled throughout the presentation of the evidence with the question of whether Officer Preston was an employee of the City of

Carlsbad as of November 1st, 2013 and whether or not that is a question of law or fact in this case. No breach of contract cause of action has been pled, rather the first two causes of action presumed plaintiff was still an employee on November 1, 2013. There is significant evidence on the issue. Where the line is drawn on when something is a question of fact versus a question of law is a never-ending inquiry for a trial judge.

"In this instance, since the factual sequence of events are undisputed, the court determines plaintiff's employment status to be a question of law. And, to that extent, Armistead . . . is on point for this case. An employee is entitled to withdraw a resignation if she or he does so before its effective date, before it has been accepted and before the appointing power acts in reliance on the resignation.

"In this case, the court finds as a matter of law the resignation was accepted by Sergeant Lehan when he replied to the text 'congratulations' and arranged to cover plaintiff's shift, and by beginning to process the benefits, such as sick leave, when . . . the City of Carlsbad began to process the benefits, such as sick leave benefits, retirement, et cetera. Furthermore, defendant started to process the P.A.F. form. . . . The court finds that as a matter of law that in applying Armistead to the facts in this case, the offer to resign had been accepted and the City had acted in reliance on the resignation. The court finds that Officer Preston did not have the ability to rescind his resignation.

"Furthermore, the court finds as to both the first and second causes of action that plaintiff did not adequately notify the Carlsbad Police Department that he had a disability. Relying on Scotch v. Art Institute of California[] (2009) 173 Cal.App.4th 986[,] 1008. The case clearly applies to the case at bar. In this case, plaintiff had not

specifically identified the disability and resulting limitations and had not suggested a reasonable accommodation. The court further finds Taylor v. Principal Financial Group, Inc. (5th Cir[.] 1996) 93 F.3d 155 to 165 to be persuasive. As stated in Taylor, 'It is not the illness which the employer must accommodate, but rather any limitations or restrictions caused by the illness.'

"In this case Preston never requested an accommodation, rather, faced with the last minute notice that he was not being hired by the sheriff's department, he requested reinstatement without any accommodation. He never notified the Carlsbad Police Department that he did not meet those standards, nor of any limitations that required accommodation.

"Featherstone v. So. Cal. Permanente Medical Group[] (2017) 10 Cal.App.5th 1150 [(*Featherstone*)] also supports the court's ruling regarding the lack of adequate notice to the employer. The court also relies on Brundage v. Hahn (1997) 57 Cal.App.4th 228 [(*Brundage*)]. In this case, as in Brundage, plaintiff seeks return to full duty as an accommodation. Here, as in Brundage, the court finds that plaintiff is not seeking an accommodation under the A.D.A."[7]

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7 The record shows the court denied nonsuit with respect to plaintiff's fifth cause of action for interference with contractual relations. In light of the court's ruling, plaintiff immediately dismissed that cause of action without prejudice.

DISCUSSION

A. *Guiding Principles*

"A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his [or her] favor. [Citation.] 'In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give "to the plaintiff['s] evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff['s] favor." ' [Citation.] A mere 'scintilla of evidence' does not create a conflict for the jury's resolution; 'there must be *substantial evidence* to create the necessary conflict.' [Citation.]" (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291 (*Nally*).)

On appeal, we review a grant of nonsuit de novo. (*McNair v. City and County of San Francisco* (2016) 5 Cal.App.5th 1154, 1168–1169.) "In reviewing a grant of nonsuit, we are 'guided by the same rule requiring evaluation of the evidence in the light most favorable to the plaintiff.' [Citation.] We will not sustain the judgment ' "unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law." ' [Citations.]" (*Nally*, *supra*, 47 Cal.3d at p. 291.)

We may sustain the granting of the motion on any ground specified by the moving party in the nonsuit motion, whether or not it was the ground relied upon by the trial court. (*Saunders v. Taylor* (1996 42 Cal.App.4th 1538, 1542.)

With these general principles in mind, we now turn to the merits of Preston's appeal with respect to his first and third causes of action.

B. *FEHA Claim*

1. Legal Framework

FEHA prohibits several employment practices relating to physical disabilities, which is at issue in the instant case. "First, it prohibits employers from refusing to hire, discharging, or otherwise discriminating against employees because of their physical disabilities. [Citation.] Second, it prohibits employers from failing to make reasonable accommodation for the known physical disabilities of employees. [Citation.] Third, it prohibits them from failing to engage in a timely and good faith interactive process with employees to determine effective reasonable accommodations." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 371 (*Nealy*). "Separate causes of action exist for each of these unlawful practices." (*Ibid.*; § 12940, subds. (a) [discrimination based on "physical disability"]; (m) [failure to make "reasonable accommodation for the known physical . . . disability"]; & (n) [failure to "engage in a timely, good faith, interactive process . . . to determine effective reasonable accommodations" for such a physical disability].) Preston in his operative complaint alleged all three grounds as a basis of liability.

For Preston to succeed on any one of the grounds under section 12940, subdivisions (a), (m), or (n), he had to prove his hearing loss constituted a "physical disability" under FEHA. As relevant here, a physical disability means any "disorder, condition, … or anatomical loss that does both of the following: (A) Affects one or more of the following body systems: . . . special sense organs[; and] (B) Limits a major life activity." (§ 12926, subd. (m)(1).) "A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity *difficult*." (*Id.*, subd. (m)(1)(B)(ii), italics added.) " 'Major life activities' shall be broadly construed and includes physical, mental, and social activities and working." (*Id.*, subd. (m)(1)(B)(iii).)

2. Analysis

Here, disregarding the conflicting evidence — including the fact it appears Preston "backdated" his IOD to October 30, when he testified he actually filled the form out on October 31 and submitted it on November 1, the same date his retirement became effective — and giving the evidence presented by Preston the value to which it is legally entitled (*Nally*, *supra*, 47 Cal.3d at p. 291), we independently conclude the court properly granted nonsuit on Preston's first cause of action because there was no evidence Preston actually suffered from a "physical disability" as defined by statute.

It was insufficient for Preston simply to allege he had a disability; or to claim he was on a "medical hold" with his future employer, the County; or, even crediting his testimony, that he told City and/or his supervisor Lehan on October 30 that he had hearing loss, or otherwise identified an injury or some physical condition. To proceed as

a physically disabled person under the statutory definition, Preston needed to demonstrate his injury or physical condition — hearing loss in his left ear — made "difficult" the achievement of work or some other major life activity. (See § 12926, subd. (m)(1)(B)(ii).) Preston failed to produce sufficient evidence to make such a showing.

Indeed, the record unambiguously shows Preston endeavored to prove the opposite. At trial, he repeatedly admitted that his hearing loss had no effect whatsoever on his ability then to work as a police officer or made "difficult" some major life activity. (See § 12926, subd. (m)(1)(B)(ii).) In fact, when Preston was told on October 16 he needed an "otology evaluation" and was scheduled to consult with Dr. Goodman on October 18, Preston testified he did not "think anything of it" because he believed his hearing was "fine," a belief he had held "forever."

Preston also testified that, while employed with the department for more than 23 years, he had never experienced any problems with his hearing, nor had any problems performing his duties as a police officer. This testimony was backed up Preston's responses to the medical history that he himself prepared on August 30 in connection with the medical examination required by the County. In that history, he unambiguously stated he had no physical limitations and did not need any accommodation in performing his job as a police officer.

In addition, even after Preston received the October 25 letter from County human resources stating the County's medical examiner (i.e., Dr. Butler) had determined Preston had a "temporary limitation" based on the results of the HINT, which had restricted Preston from tasks involving "whispered speech and speech heard through doors and

windows," Preston again testified he did nothing as a result of this letter. In fact, Preston testified he disregarded the letter because he still believed his hearing was "fine."

It was only after Corporal Kuamoo notified Preston on October 30 that he was on a medical hold with County that Preston sought to rescind his resignation from City. Even then, however, Preston did not ask for any accommodation from City or the department, including as a result of his hearing loss. Instead, he merely wanted his job back, so that he could obtain medical treatment for his ear and "get [his] new job with the County."

Preston nonetheless contends he provided sufficient evidence to show he had a "physical disability" within the meaning of the statute, based on the testimony of Dr. Goodman. We disagree. Dr. Goodman unambiguously testified he was *not* asked to opine on whether Preston's hearing loss was a "physical disability" under FEHA. In addition, Dr. Goodman testified that Preston's hearing was "perfectly normal" in his right ear; that those with one-sided hearing loss such as Preston typically themselves accommodated "quite well" for such loss; and that any such limitations experienced by such persons would likely *not* interfere with such persons' day-to-day activities.

Moreover, Dr. Butler testified that, although he recommended Preston be cleared "with limits" or "restrictions," in his view the limitation of "hearing whispered speech and hearing noises through doors and windows" did *not* affect a "major life activity."

That Preston was diagnosed with hearing loss in one ear, which Dr. Goodman opined was likely congenital or caused by "otosclerosis," but not due to long-term exposure to loud noises, does not mean he had a "physical disability" under FEHA while

working for City and the department, or, for that matter, at any time. As noted, Preston repeatedly stated he was "fine" to work with the hearing loss *condition*, as he did not consider himself physically disabled, nor did he request any accommodation based on any such alleged disability.

On this record, we thus independently conclude that Preston failed to proffer even a "scintilla of evidence" concerning his *own* individual assessment of his alleged hearing impairment (see *Nally, supra*, 47 Cal.3d at p. 291), much less the necessary " 'substantial evidence' " (see *ibid.*), to create a conflict for the jury's resolution on the issue of whether he suffered from a "physical disability" within the meaning of the statute.[8]

C. *Labor Code 1050*

Preston also contends the court erred in granting nonsuit with respect to his third cause of action for violation of Labor Code section 1050. This statute provides, "Any person, or agent or officer thereof, who, after having discharged an employee from the

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8 In light of our decision, we need not address City's alternate contentions to support nonsuit, although they too appear meritorious, including that Chief Morrison did not even know about Preston's hearing loss when the chief rejected Preston's request to unretire two days' before it was to be effective, which notice Preston had given on four days' notice; that Chief Morrison's refusal to allow Preston to unretire was not an adverse employment action under FEHA (see *Featherstone, supra,* 10 Cal.App.5th at pp. 1161–1162 [noting absent evidence of constructive discharge or contractual obligation, a refusal to allow a disabled person to rescind a voluntary discharge, "that is, a resignation free of employer coercion or misconduct — is not an adverse employment action" under FEHA]); and that Preston, in any event, never sought from City or the department any accommodation, reasonable or otherwise, as he believed his hearing was "fine," and all he wanted was his job back until he was hired by County as a deputy sheriff. (See *Nealy, supra,* 234 Cal.App.4th at p. 373 [noting a "reasonable accommodation is a modification or adjudgment to the work environment that enables the employee to perform the essential functions of the job he or she holds or desires"].)

service of such person or after an employee has voluntarily left such service, by any misrepresentation prevents or attempts to prevent the former employee from *obtaining* employment, is guilty of a misdemeanor." (Lab. Code, § 1050, italics added.)

"Labor Code section 1050 was enacted in 1937 as a restatement of former Penal Code section 653e. (Stats. 1937, ch. 90, § 2, p. 185; Stats. 1937, ch. 90, § 1050, p. 211; Stats. 1937, ch. 90, § 8100, pp. 326–328.) Former Penal Code section 653e provided: 'Any person, firm or corporation . . . who, after having discharged an employee from the service of such person, firm or corporation or after having paid off an employee voluntarily leaving such service, shall . . . misrepresent and thereby prevent or attempt to prevent such former employee from *obtaining* employment with any other person, firm or corporation . . . shall be guilty of a misdemeanor . . . . [¶] . . . [A]ny person, firm, association or corporation . . . who shall violate any of the provisions of this act shall be liable to the party or parties aggrieved, in a civil action, to treble damages.' (Stats. 1913, ch. 350, § 1, p. 712, as amended by Stats. 1929, ch. 586, § 1, pp. 988–989.)" (*Kelly v. General Tel. Co.* (1982) 136 Cal.App.3d 278, 288–289 (*Kelly*).)

We conclude from the plain language of Labor Code section 1050 that this statute only applies when a former employee such as Preston is prevented from *obtaining* employment. (See *Kelly*, *supra*, 136 Cal.App.3d at p. 288 [noting Labor Code § 1050 "applies only to misrepresentations made to *prospective* employers," italics added]; *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616–617 [citing the general rule that in interpreting a statute to determine the Legislature intent, "[w]e first examine the statutory language, giving it a plain and commonsense meaning," and noting "[i]f the

language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend"].)

The record in the instant case shows that Preston already was employed by County — albeit on probation — as a deputy sheriff when Chief Morrison on or about July 16, 2014, wrote the sheriff's department asking that Preston be ordered to prepare a written report regarding his belief that a former department police officer was potentially responsible for the murder of Jodine Serrin, as he alleged in May 2014. Based on the "plain meaning" of the words "prevents or attempts to prevent the former employee from *obtaining* employment" in Labor Code section 1050 (emphasis added), we independently conclude nonsuit was properly granted on Preston's third cause of action.

DISPOSITION

The order granting nonsuit on Preston's first and third causes of action, and the judgment entered thereon, is affirmed. City to recover its costs of appeal.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

IRION, J.